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No. 85-551

In the Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL., APPELLANTS

v.

RONALD REAGAN, PRESIDENT OF THE UNITED STATES, AND UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

ANTHONY J. STEINMEYER
NEIL H. KOSLOWE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether the one-House legislative veto provision in the Federal Pay Comparability Act of 1970, 5 U.S.C. 5301 *et seq.*, which concededly is unconstitutional in light of this Court's decision in *INS* v. *Chadha*, 462 U.S. 919 (1983), is severable from the remainder of the Act.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statute involved	2
Statement	2
Argument	3
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Alaska Airlines, Inc. v. *Donovan*, 766 F.2d 1550 6

EEOC v. *Allstate Insurance Co.*, 570 F. Supp. 1224, appeal dismissed, No. 83-1021 (June 11, 1984) 4, 5, 6

EEOC v. *Martin Industries, Inc.*, No. 83-1893 (Oct. 1, 1984) 5

EEOC v. *Westinghouse Electric Co.*, No. 83-1938 (Oct. 1, 1984) 5

Heckler v. *Edwards*, No. 82-874 (Mar. 21, 1984) 3-4

INS v. *Chadha*, 462 U.S. 919 3

Statutes:

Federal Pay Comparability Act of 1970, 5 U.S.C. 5301 *et seq.* 2

5 U.S.C. 5301(a) 2

5 U.S.C. 5305(a)(2) 2

5 U.S.C. 5305(b) 2

5 U.S.C. 5305(c) 3

5 U.S.C. 5305(c)(1) 2

5 U.S.C. 5305(c)(2) 2, 3, 4

5 U.S.C. 5306 2

28 U.S.C. 1252 ..... 2, 3, 4, 5, 6

28 U.S.C. 1291 4

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MOTION TO DISMISS

Pursuant to Rule 16.1 of the Rules of this Court, the Solicitor General, on behalf of the President of the United States and the United States, moves that this appeal be dismissed for lack of jurisdiction.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-13a) is not yet reported.

JURISDICTION

The judgment of the district court (J.S. App. 16a) was entered on July 31, 1985, and a notice of appeal to this Court was filed on July 31, 1985. The appeal was docketed on September 30, 1985. Appellants invoke the jurisdiction

of this Court under 28 U.S.C. 1252. However, as explained below (see pages 3-6, *infra*), the Court does not have jurisdiction of the appeal.

STATUTE INVOLVED

28 U.S.C. 1252 provides in relevant part:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

STATEMENT

1. Under the Federal Pay Comparability Act of 1970, 5 U.S.C. 5301 *et seq.*, the rates of pay of federal employees under various statutory pay systems are subject to annual adjustment, in accordance with such principles as comparability with private enterprise and a correlation between pay and work performance. See 5 U.S.C. 5301(a), 5305(a)(2), 5305(b), 5306. The Act also provides, however, that if the President determines that a national emergency or economic conditions affecting the general welfare render a comparability adjustment inappropriate, he may prepare and transmit to Congress an "alternative plan." 5 U.S.C. 5305(c)(1). The alternative plan becomes effective unless it is disapproved by resolution of either House of Congress within 30 days of its transmittal to Congress. 5 U.S.C. 5305(c)(2).

2. Appellant American Federation of Government Employees (AFGE) brought this action to challenge the alternative pay plans prepared by the President for fiscal years 1980, 1981, 1983 and 1985; appellant National Treasury Employees Union (NTEU) challenged the alternative plan only for fiscal year 1985. AFGE and NTEU contended that the one-House veto provision in 5 U.S.C. 5305(c)(2) was unconstitutional and that it was not severable from the remainder of 5 U.S.C. 5305(c) authorizing the President to establish an alternative pay plan; that the alternative pay plans for the years in question therefore should be invalidated; and that the members of the appellant unions should have been compensated at the higher rate indicated by the statutory formula. Appellants sought money damages in the amount of the additional compensation their members would have received under the statutory formula. J.S. App. 2a, 5a-6a, 8a.

The government conceded that the legislative veto provision in 5 U.S.C. 5305(c)(2) was unconstitutional under this Court's decision in *INS* v. *Chadha,* 462 U.S. 919 (1983) (J.S. App. 8a). Accordingly, the only issue before the district court was "whether the unconstitutional legislative veto provision is severable from the remainder of the alternative pay plan portion, leaving the alternative pay plan intact" (*ibid.*). The district court, agreeing with the government, held that the legislative veto provision was severable (*id.* at 8a-13a).

ARGUMENT

The Court clearly has no jurisdiction over this direct appeal under 28 U.S.C. 1252. The appeal therefore should be dismissed for lack of jurisdiction.

1. In *Heckler* v. *Edwards,* No. 82-874 (Mar. 21, 1984), the Court held that "a party does not have a right to direct review in the Supreme Court under 28 U.S.C. 1252 unless the holding of federal statutory unconstitutionality is in

issue" (slip op. 5). In *Edwards,* the government conceded that the relevant provision of the Social Security Act was unconstitutional and challenged only the relief granted by the district court. Slip op. 2, 4. The Court held that the appeal in such circumstances must be taken to the court of appeals pursuant to 28 U.S.C. 1291, not to this Court pursuant to 28 U.S.C. 1252. Slip op. 14-15.

Edwards compels the dismissal of the direct appeal in this case. Appellants acknowledge (J.S. 2) that the government conceded the unconstitutionality of the legislative veto provision in 5 U.S.C. 5305(c)(2). They challenge only the district court's ruling on the question of relief, in which the court held that the legislative veto provision was severable from the remainder of the alternative pay plan authorization and accordingly denied appellants' request for back pay for their members. Under *Edwards,* a direct appeal does not lie to this Court under 28 U.S.C. 1252 to present that non-constitutional question.

2. If there could be any remaining doubt on the jurisdictional issue, it is dispelled by the Court's dismissal of the appeal in *EEOC* v. *Allstate Insurance Co.,* No. 83-1021 (June 11, 1984). In that case, the district court held that the Reorganization Act of 1977 was invalid in its entirety because of the presence of what the district court found to be an inseverable legislative veto provision. The district court therefore held that a reorganization plan that transferred authority to enforce the Equal Pay Act from the Secretary of Labor to the Equal Employment Opportunity Commission likewise was invalid, and it granted Allstate's motion to dismiss an Equal Pay Act enforcement action brought by the EEOC. 570 F. Supp. 1224 (S.D. Miss. 1983). The EEOC took a protective appeal to this Court under 28 U.S.C. 1252 to challenge the district court's severability ruling. However, the EEOC argued that this Court did not have jurisdiction of the appeal under 28 U.S.C. 1252 because the severability question

was solely one of statutory construction, and that the appeal instead should be taken to the court of appeals pursuant to 28 U.S.C. 1291. The EEOC therefore urged the Court to dismiss the appeal. 83-1021 J.S. 6-8, 17; 83-1021 Reply Br. 1-3, 9. This Court agreed with the EEOC's jurisdictional argument and dismissed the appeal in the order cited above. The Court subsequently dismissed identical appeals in *EEOC* v. *Martin Industries, Inc.*, No. 83-1893 (Oct. 1, 1984), and *EEOC* v. *Westinghouse Electric Co.*, No. 83-1938 (Oct. 1, 1984).

It follows a fortiori from the dismissal of the appeals in *Allstate, Martin Industries* and *Westinghouse* that the appeal in the instant case must be dismissed. In those cases, the district court held that the legislative veto provision was *not* severable, and it effectively invalidated the entire Reorganization Act; the EEOC's direct appeal in each case challenged the district court's holding that the provisions of the Reorganization Act other than its legislative veto provision could not be given effect. In this case, by contrast, the district court held that the legislative veto provision *was* severable, and it therefore did not effectively invalidate the Federal Pay Comparability Act, either in its entirety or insofar as it authorizes the President to adopt an alternative pay plan. Thus, even if the question of severability were viewed as presenting a question of the "constitutionality" of the remainder of the Federal Pay Comparability Act, the district court in this case upheld the remainder of the Act and therefore did not hold an Act of Congress unconstitutional within the meaning of 28 U.S.C. 1252.

In any event, it is clear from *Allstate* that a ruling on the question of severability is not to be viewed as presenting a question of constitutional dimension for purposes of this Court's jurisdiction under 28 U.S.C. 1252. In *Allstate*, the appellee argued that the district court's holding that the legislative veto provision was not severable from the re-

mainder of the Reorganization Act amounted to a holding that the entire Act was unconstitutional (see 83-1021 Mot. to Aff. 4-6), and the district court in fact stated its holding in those terms (570 F. Supp. at 1232). This Court nevertheless dismissed the appeal. In this case, by contrast, the district court resolved the severability issue solely as a matter of statutory construction and did not describe its severability holding in constitutional terms (J.S. App. 8a-13a). As appellants recognize (J.S. 4), even the dissenting opinion in *Allstate* would have held that 28 U.S.C. 1252 is inapplicable to an appeal from a decision on a question of severability that is resolved solely on statutory grounds. *Allstate,* slip op. 5-6 (Burger, C.J., dissenting). For this additional reason, any appeal in this case must be taken to the court of appeals. See *Alaska Airlines, Inc.* v. *Donovan,* 766 F.2d 1550, 1554-1556 (D.C. Cir. 1985); *id.* at 1565 (Ginsburg, J., concurring).

CONCLUSION

The appeal should be dismissed for lack of jurisdiction.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

ANTHONY J. STEINMEYER
NEIL H. KOSLOWE
Attorneys

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